IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1299 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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SWAMI DHANJIBHAI BALCHANDRA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KB ANANDJIWALA for Appellant(s) : 1,
MR AY KOGJE, LD.APP for Opponent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 13/03/2006

CAV JUDGMENT

1. The present appeal is preferred by the appellant-convict-accused of Special Case No.4

of 1991, decided on 30th September, 1993 by the learned Special Judge (Court No.2) of City Ahmedabad. The appellant-accused (hereinafter referred to as 'the accused') stood trial for the offences punishable under Sections 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'). The accused came to be convicted vide judgment and order under challenge for the offence punishable under Section 7 of the Act and has been imposed sentence to undergo simple imprisonment for three years and to pay a fine of Rs.100/-, in default to undergo further simple imprisonment for a period of three months. The accused is also found guilty by the ld.trial Judge for the offences punishable Sections 13(1)(d)(i) and (ii) of the Act and for that offence, the ld.trial Judge has imposed simple imprisonment for a period of three years and a fine of Rs.500/-, in default to undergo further simple imprisonment for three months. Of course, these sentences are ordered to run concurrently. Thus, the judgment and order of

conviction and sentence is under challenge and the same has been assailed on various grounds mentioned in paragraph no.4 of the memo of the appeal and the appellant has tried to point out various aspects where according to the appellant, the learned Special Judge has erred either in appreciating the evidence and also in applying relevant legal aspects.

2. The facts of the accused's case are that the accused at the relevant point of time was a Senior Clerk working in the office of the Gujarat Housing Board in Estate Department and he came to be prosecuted on the basis of the complaint lodged with Anti-Corruption Bureau by one Rajnikant Muljibhai Patel (hereinafter referred to as 'the complainant') on 30th April, 1990. The allegation in the complaint is that the brother-in-law (wife's brother) of the complainant wanted to purchase a flat constructed by Gujarat Housing Board situated in one of the schemes known as 'Vandan Apartment', Nr.Ankoor Cross Roads, Naranpura, Ahmedabad,

bearing No.36/259. The said flat was standing in the name of original owner Vasantben and she had purchased the said flat on higher purchase basis from the Gujarat Housing Board. It is alleged that in connection with transfer of said flat in the name of Hasmukhbhai, certain formalities were required to be performed and the accused was dealing with such transfer of flats from one person's name to the proposed transferee and the accused demanded illegal gratification of Rs.1000/- for helping the cause. It is the say of the prosecution that when Hasmukhbhai decided to purchase the said flat from Vasantben, both of them had gone to the office of the Gujarat Housing Board situated near Pragatinagar, Naranpura at Ahmedabad, whereby they were asked to produce requisite form signed by the seller and the prospective buyer and they were asked to file an affidavit on an appropriate stamp paper. They had visited the said office on 26th April, 1990 and at that time, along with the complainant, the said Vasantben her son and Hasmukhbhai were there with the complainant

apart from a friend of the complainant. On inquiry this group of persons was asked to go to the table of one Mr.Swamy i.e. present appellant-orig.accused as he was dealing with transfer of flats of Housing Board. The papers were shown to the accused who scrutinized the same and put initials on them. However, they were advised that the affidavits are required to be sworn before the learned Magistrate and the affidavits were prepared. As per the requirement and advice given by the accused, an amount of Rs.3001/- was deposited with the office of the Housing Board as transfer charges and thereafter all papers were given to the accused on the same day. It is the case of the prosecution that on that day the accused told the complainant that if the complainant wanted to get the flat duly transferred in the name of Hasmukhbhai, then the complainant will have to pay him Rs.1000/- as illegal gratification but the complainant had expressed his inability to pay such a huge amount. The accused on that day tried to convince the complainant that he had to disburse

the said amount and the accused would get only Rs.200/-. Thereafter, when the complainant was not left with any another alternative, the complainant agreed to pay him Rs.500/-. The office of the Housing Board was closed from 27th April, 1990 to 29th April, 1990 and it was opened on 30th April, 1990. On that day, the complainant went along with papers but as he had not paid the amount of Rs.500/- towards illegal gratification, the papers were given back by the accused to the complainant. The case of the prosecution is that the complainant never wanted to make payment of any bribe money and, therefore, he approached the office of the Anti Corruption Bureau (ACB), Ahmedabad on 30th April, 1990 and lodged the complaint to the above effect, whereupon the trap ultimately was arranged. It is the case of the prosecution that the raid was successful and it was carried out in the canteen of the office of the Gujarat Housing Board. However, the accused fled away from the site where he had accepted the amount, the muddamal currency notes. A formal panchnama

of recovery of amount was carried out at Gandhinagar and smeared bribe money came to be recovered from Gandhinagar and that too from the house of one employee of Gujarat Housing Board with whom the accused had exchanged the smeared notes after accepting them from the complainant. On conclusion of the trial, the ld.Special Judge found that the prosecution has successfully established the charges levelled against the accused.

3. I have carefully gone through the judgment and order under challenge and Mr.K.B. Anandjiwala, learned counsel appearing for the appellant-orig.accused, has taken me through the memo of the appeal and documentary evidence led by prosecution. Mr.Anandjiwala, learned counsel appearing for the appellant, has submitted that the finding of the learned Judge is erroneous and certain important relevant aspects have been ignored. On the contrary, in the present case, it was not safe to conclude that the raid was carried out by the prosecution successfully and

non-examination of certain important witnesses to prove initial demand and actual demand goes to the root of the case placed by the prosecution. The accused was required to be acquitted or this is a case where the accused ought to have been acquitted saying that the evidence led by the prosecution is not beyond shadow of doubt.

4. The prosecution has examined four witnesses namely (i) complainant-Rajnikant Muljibhai Patel, Exh.7; (ii) Nathabhai Ramabhai Vankar, Panch no.1, Exh.8; (iii) Bhanuprasad Keshavlal Mevada, from whom the smeared currency notes were recovered from Gandhinagar, Exh.12 and (iv) Vinod J. Vyas, Police Inspector, Anti-Corruption Bureau, who according to the case of the prosecution carried out the entire exercise including drawing of panchnama relied upon by the prosecution. In ACB trap cases, the contents of the panchnama, places of drawing the entire panchnama and the exercise carried out by the raiding party reflected through panchnama are

always found relevant by the Courts and, therefore, the role of the Police Officer, who has drawn panchnama or the part of such panchnama in the entire exercise of raid is also seen and appreciated as vital part of the evidence. The defence of the accused is total denial. According to accused, neither demand was made by him nor he has accepted the said amount. The prosecution is supposed to prove **(i)** initial demand, **(ii)** demand soon before the acceptance (if made) and the nature of conversation that has been placed by the prosecution in each good case, **(iii)** acceptance of illegal gratification and **(iv)** recovery of muddamal currency notes or the article of gratification accepted, if need be. It is argued that none of these four aspects is fully established and, therefore, the accused should be acquitted as the whole career of a public servant is at stake. In such case, the case of prosecution should be free from all doubts and strictest proof is required to be brought on record by cogent and convincing evidence. The Court should avoid inferences or

surmises and should not commit any error in raising presumptions unless there is scope to raise such presumption against the accused; otherwise onus would never shift on the shoulders of the accused. Transparency at all stages is one of the most essential things in ACB cases. The complainant should be transparent in lodging the complaint. The procedure should also be followed in a transparent manner including selection of panchas. The panchas should be independent and should have a transparent sterling character. In the same way, drawing of second part of panchnama also should be carried out with utmost care and normally it should be drawn by the officer who has been active in carrying out the raid and drawing the first part of panchnama. It is argued that to prove initial demand, the prosecution ought to have examined either Hasmukhbhai or Vasantben or her son Narendra. Surprisingly none of these persons was knowing about the procedure for transfer of flat and, therefore, a peon was asked as to whom they should contact for

transfer of flat and as per the case of the prosecution, the peon led this group of persons to the table of the accused. Mr.Mevada, from whom the muddamal currency notes were recovered, is also an employee of the Gujarat Housing Board. Undisputedly, having his seat and work place in the different area and storey of the building of the office of the Gujarat Housing Board, it is argued by Mr.Anandjiwala that on 26th April, 1990, the complainant went to the office of the Gujarat Housing Board, Estate Manager No.2, for the first time along with Vasantben, her son Narendra, her brother-in-law Hasmukhbhai and Manubhai Patel, with regard to the transfer of a Flat in Vandan Apartment. A peon was asked as to whom they should contact for transfer of the Apartment. Thereupon, they were led to the table of Mr.Swami-orig.accused and an application for transfer of the Apartment was given to the accused along with other papers. It is also stated in the complaint that the accused demanded an amount of Rs.1,000/- for transfer of the said Apartment/Flat. This talk

must have taken place in presence of the above mentioned four persons, however, none of them is examined in this case. It also transpires from the complaint that the first meeting with the accused took place on 26th April, 1990 and not prior to that. Therefore, the evidence of the complainant with regard to the demand that the said demand was made around 11th or 12th April, 1990, and subsequently the said demand was repeated is falsified. There is no corroboration to the evidence of the complainant on this aspect as none of those persons who had accompanied him has been examined in this case. It also transpires that the complainant never knew the accused prior to 26th April, 1990. Therefore, regarding initial demand the evidence of the complainant is doubtful. There is no corroboration to his deposition. On the contrary, it appears that he is modulating his deposition with a view to explaining other aspects which had emerged. The evidence of complainant is also more or less the evidence of an accomplish. Regarding the the agreement to

pay and accept the amount of Rs.500/- also, the evidence is conflicting and, therefore, no reliance can be placed on the evidence of the complainant with regard to the initial demand.

5. The other backbone of argument of Mr.Anandjiwala is that the prosecution is under great obligation to prove the demand made during conversation prior to acceptance of illegal gratification. This small piece of evidence has to be proved beyond reasonable doubt as the words uttered during conversation that had taken place before the accused and the complainant; and while appreciating this part of evidence, the evidence of complainant as well as Panch No.1 who is supposed to hear the conversation between the accused and the complainant, needs close scanning in the background of the explanation given by the accused if any. In the present case, according to Mr.Anandjiwala, the complainant has deposed about this aspect in his examination-in-chief (Para:5). If the conversation regarding demand of illegal

gratification prior to acceptance had taken place either twice or thrice and except on the date and time of the trap, the Panch no.1 is not a witness to such conversation, then the chain of such pre-acceptance conversation as to the demand of illegal gratification also requires to be established beyond reasonable doubt. According to Mr.Anandjiwala, the complainant contacted the accused first and handed over the papers to him. The accused saw the papers and separated the affidavits, undertaking, pay-slips of Hasmukhbhai, etc. from the bunch. At that time, the accused asked about the panch, therefore, the complainant introduced the panch as brother of Hasmukhbhai. Thereafter, the accused asked the question to the panch as to where he was working, to which he replied that he is working in Kathwada private firm. Thereafter, the accused asked as to whether he has brought the amount, to which the complainant replied and thereafter, the accused told the complainant to go to the canteen and he would be following the complainant. Thereupon, the

complainant and the Panch went to the canteen which is situated on the ground floor. In his cross-examination, he has deposed that on 30th April, 1990, he tried to give relevant papers to the accused, but he refused to accept. He further says that he had gone to the office of the accused to hand over the papers at 11-00 a.m. on that day and at that time, the accused told him that he would not accept the papers unless the amount is paid. He has further stated that he never told anybody including Hasmukhbhai about the demand of Rs.1,000/- prior to 30th April, 1990. He has further deposed that it is not true that the accused took the papers from him and separated some papers and thereafter, the pin was applied. As there was no signature of Vasantben on transfer application and other necessary documents, the accused handed over the papers to him. On this aspect, the evidence of Panch is that the accused took the papers, but as there was no signature of Vasantben on undertaking form and transfer application form, the accused after applying the pin on certain

documents returned the same to the complainant. He has further denied that at the time of returning the papers to him, the accused told him that the papers are incomplete and thereafter, the accused told him to come on 01st May, 1990 after obtaining necessary signatures on certain documents. On this aspect, his attention was drawn towards his statement before the police regarding the same. He has also admitted that he had stated before the police that the accused told him to come on 01st May, 1990 at 11-30 a.m. after completing the undertaking and other documents. He has also admitted that on 30th April, 1990, when he had gone to the accused along with the papers, undertaking form was blank. It is pertinent to note that according to the complainant he had been to the accused on 26th April, 1990. At that time, the accused told him to get the signature of Vasantben on Undertaking form as well as on transfer application form. Vasantben was very much present along with the complainant on that day. She had gone to the Court of Magistrate for

swearing, but surprisingly her signature was not obtained or taken on undertaking form as well as on application form. It clearly shows that Vasantben must not have been told about putting her signature on such forms. It is borne out from the muster roll which is regularly maintained in the office of the Gujarat Housing Board that on that day the accused was not present, so there is no question of contacting the accused on that aspect in his evidence and so far as this aspect is concerned, there is no corroboration to the evidence of the complainant from any other independent source.

6. According to Mr.Anandjiwala, the Panch witness-Mr.Vankar has tried to corroborate the complainant but while doing it, he has made material omissions amounting to contradiction and at some places he has made certain improvements, only with a view to support the say of the complainant. Before the complainant, the Panch and the accused met on the table of the canteen situated in the office of the

Gujarat Housing Board at the instance of the accused and some conversation had taken place, as per the say of Mr.Vankar, the accused told the complainant to complete the documents and thereafter to see him on the next day at 11-30 a.m., and after 11-30 a.m., he (accused) would go out to make one affidavit-for his personal work. The complainant was also informed that if it is not convenience to go at 11-30 a.m. on the next day, then he may go on the day after. But the accused had not demanded any amount even as per the conversation of Panch No.1-Mr.Vankar. As per the evidence of Mr.Vankar, the complainant told the accused that as per the talk he has brought the amount and at that time, the complainant had posed himself to be a poor man and requested him to waive the rest of the amount and he would give the same after the work is done. So the case of the prosecution is that the location of the trap anticipated by the prosecution changed because the accused had told the complainant and the panch to go to the canteen. It has come on record that one

undertaking which was required to be brought duly signed and by completing details was blank. But Mr.Vankar-Panch has tried to hide this aspect only with a view to corroborate the complainant. Further attempt to give unconvincing explanation by panch makes independence and objectivity doubtful, is also one of the arguments of Mr.Anandjiwala. Undisputedly, the ACB staff, part of raiding party were all the while in the office and three members of the ACB staff had entered the canteen much prior to the actual conversation that had taken place between the accused and the complainant on the table of the canteen and they were present when the accused left the canteen. Even then the accused could not be intercepted by the ACB staff members and he was able to go out of the canteen and it emerges from record that the accused had moved at more than one place out of the canteen and had met more than one person before he could be apprehended by the ACB staff. The ld.trial Judge has appreciated this part of evidence saying that after

pocketing the currency notes, the accused suddenly fled away from the canteen even before the pre-arranged signal could be given to the ACB officers and he was able to go to some other portion of the building of the Office of the Gujarat Housing Board being a very huge complex. But the fact remains that the accused was ultimately traced in the office building itself. But the ACB officers found that smeared muddamal currency notes were not with the accused. However, his hand and pant pocket were found smeared with anthracene powder when the ultraviolet lamp test was carried out. So according to Mr.Anandjiwala, muddamal currency notes have not been recovered from the accused and ultimately, they have been recovered from the residence of another employee of the Gujarat Housing Board namely Mr.B.K.Mevada and that too from Mr.Mevada's residence at Gandhinagar. It is in the evidence that Mr.Mevada resides at Gandhinagar and he had left for Gandhinagar. There is no exact convincing evidence as to after how many minutes or hours of reaching of

Mr.Mevada to his residence, the ACB officers were able to recover the muddamal-smeared currency notes and the part of the panchnama whereby the whole exercise was carried out to find out anthracene powder marks at various places by doing ultraviolet lamp test. It is argued that the second part of the panchnama is not genuine and trustworthy. In reality, to lead convincing and cogent evidence, the raiding party ought to have drawn this panchnama in three parts. No independent person from the office of the accused has been examined on the point of tracing out the anthracene powder marks on the hands and pant pocket of the accused. He has also tried to point out that the main officer namely the head of the raiding party had never been to Gandhinagar for recovery of muddamal currency notes from Mr.Mevada and absence of evidence that ultimately who bear the burden of giving Rs.500/- to Mr.Mevada and when the amount was paid to Mr.Mevada, is also a question which has not been satisfactorily replied by the prosecution. It is not a matter

of dispute that it was a day of salary for the employees of the Gujarat Housing Board and for his personal convenience Mr.Mevada had given change of Rs.500/- out of his salary amount to the accused. It was possible for the prosecution to either lead negative or positive evidence as to the availability of anthracene powder marks on the hands of Mr.Mevada, on hand or pant pocket and other currency notes of his amount of salary but there is no reference about this in the panchnama. So when the second part of panchnama is found doubtful and a document to show that the raiding party had remained successful, it ought not have been used as an important corroborative piece of evidence to the oral version of the prosecution witness namly Panch No.1-Mr.Vankar and the raiding party ACB Police Inspector Mr.Vinod Vyas. Since three police personnel from the raiding party were very well there inside the canteen, there is no convincing evidence as to the passing of muddamal currency notes from complainant to the accused from any of these three police

personnel. The fact that neither the complainant nor the accused has paid for the tea that they had consumed, makes the entire second part of panchnama doubtful from the very beginning, is also one of the arguments of Mr.Anandjiwala. So according to Mr.Anandjiwala, the learned Special Judge has grossly erred in accepting the evidence led by prosecution that the hands as well as pant pocket of the accused when tested under the ultraviolet lamp, they were found smeared with anthracene powder and evidence of Mr.Mevada that he had accepted the muddamal currency notes while giving change for the said notes. Mr.Anandjiwala has drawn the attention of the Court that even as per the say of Mr.Vankar, no anthracene powder marks were seen on any of the currency notes of denomination of Rs.50/- recovered from the accused and brought under the test of ultraviolet lamp. The relevant part of the panchnama drawn is also read over to the Court. It is mentioned in the panchnama that there were 10 currency notes of denomination of Rs.50/- and none of the notes was found smeared

with anthracene powder. In the same way, not a single note of the denomination of Rs.100/- found from the pocket of the accused was part of the muddamal currency notes. This fact was verified by comparing the numbers of the notes mentioned in the first part of the panchnama. Therefore, it is argued that if the accused after accepting the bribe amount had given the very currency notes to Mr.Mevada and had received currency notes of denomination of Rs.50/- as change, then more than one currency note of denomination of Rs.50/- ought to have been found smeared with anthracene powder and the prosecution is under obligation to establish as to how this could happen and why only one currency note of small denomination was found smeared with anthracene powder which was allegedly in the pocket of accused when he was apprehended. According to Mr.Anandjiwala, the learned Judge has failed in appreciating the nature of evidence led by the prosecution and has ignored the material contradictions and omissions along with the basic infirmities while

convicting the accused.

7. According to Mr.Anandjiwala, one other important aspect has been ignored by the learned Special Judge that the accused and the PW Mr.Mevada were not totally unknown to each other. They were serving in the same office and their office was there in the same building. It is not the say of the prosecution that either of these two employees has been appointed recently in the Gujarat Housing Board. The fact that no identification parade was carried out by the Investigating Officer, can take anybody to a logical inference that the accused and the PW Mr.Mevada must be knowing each other prior to the date of incident. Mr.Mevada has admitted that he received the salary from one Mr.R.R.Shah and an unknown man had asked for change. Mr.R.R.Shah neither identify him nor he inquired about the said unknown person. It emerges from the evidence of Mr.Mevada that employee of his office came at his house along with others and Mr.R.R.Shah was one of them; one was

Mr.Dataniya, peon of his office. Most of the persons had come inside the house and members of the ACB party had interrogated him in respect of money and he had handed over his salary amount to one of the members of the ACB party. It has come on record that he was not sure whether the person from whom he had received the change i.e. accused was present at the relevant point of time inside his house or not. Considering the material improvements and contradictions, it appears that the police has recorded the statement of Mr.Mevada to fix up the identity of the accused but it is in evidence that the day on which the muddamal currency notes were recovered, the accused was not brought before Mr.Mevada for identification. When Police Inspector Mr. Vinod Vyas has deposed in his evidence that " from somebody it was learnt that the muddamal currency notes have been given to a person resident of Gandhinagar and it has been given as exchange and that person is Mr.Mevada of Division No.5. Thereafter, they went to Gandhinagar." This part of evidence, according

to Mr.Anandjiwala, is very weak piece of evidence. The Police Inspector Mr.Vinod Vyas ought to have recorded the statement of that person. The reference of the statement made by the accused referred to in the panchnama is inadmissible in evidence. The Court cannot take cognizance of this part of the reference in panchnama as piece of evidence for any purpose. When muddamal currency notes have been recovered from the person other than the accused and when there is no evidence as to the relationship between the accused and Mr.Mevada of any kind, it becomes doubtful according to Mr.Anandjiwala that the trap can be said to be successfully carried out and muddamal currency notes as alleged by the prosecution recovered from Mr.Mevada is the result of alleged success of the decoy trap. There is no evidence that Police Inspector Mr.Vyas had ever taken the accused to Gandhinagar at the residence of Mr.Mevada and Police Inspector Mr.Vyas had entered the house of Mr.Mevada or the ultraviolet lamp test was carried out. The fact of recovery of muddamal

currency notes would not carry the case of the prosecution any further to link the accused with the crime. Certain infirmities have been specifically pointed out to the Court by Mr.Anandjiwala which can be summarised in following manner :-

(i) The evidence as to the initial demand is doubtful and the meeting of the accused at 11-00 a.m. on 30th April, 1990 is a material improvement.

(ii) There is material conflict, as to the actual conversation that had taken place in the canteen which is emerging from the evidence led by the prosecution examining panch Mr.Vankar. The complainant affects adversely to the strength of the case of the prosecution, if oral evidence is read in the background of the narration found in the panchnama drawn by the Investigating Officer.

(iii) Three officers namely Mr.Pargi, Mr.Malek and Mr.Pandey, of the raiding party constituted by the ACB Inspector Mr.Vyas, though were present in the canteen, none of them is examined with the reasons best known to the prosecution. So it appears that the prosecution wants to keep the curtain on the fact that any of these three probable eye-witnesses had actually seen the passing of currency notes from the complainant to the accused in the canteen.

(iv) The prosecution is not answering the crucial questions as to why any of these three officers did not intercept the accused, if they were really present in the canteen and why the complainant or the decoy panch did not give signal which was required to be given immediately on passing of the

currency notes to the accused. There is absence of exact evidence as to the distance between the canteen and the place of the table where the accused is provided seat as an employee, the table of Mr.R.R.Shah and the work place of Mr.Mevada; and how many ways are there to reach to any of these three places from the canteen. When an employee is supposed to be there in the office upto 06-00 p.m. Or 06-10 p.m., none of the Police Inspectors i.e.Mr.Joshi or other police officials, was able to locate Mr.Mevada in the office premises; especially when the prosecution was not able to recover the muddamal currency notes from the pant pocket of the accused. One fact that 10 currency notes, each of denomination of Rs.50/- recovered from the pocket of the accused were not smeared with anthracene powder though the same were received in exchange of muddamal

currency notes of Mr.Mevada, was required to be explained satisfactorily by the prosecution. The failure to carry out exercise of ultraviolet lamp test at Gandhinagar on the other currency notes which Mr.Mevada must have kept in his pocket with other amount that he had received, makes the story placed by the prosecution doubtful.

(v) According to Panch Mr.Vankar, it was Panch No.2 who took out the currency notes from the left side pocket of the pant of the accused. Whereas as per the panchnama, it was Panch no.1 who took out the articles from the pant pocket of the accused and when his hands were seen in U.V. Lamp rays, the fingers and tips showed the anthracene powder marks. Then in that case also there would have been powder marks on all the articles which were taken out

from the pant pocket of the accused.

(vi) That as per the evidence of Mr.Mevada, the accused was absolutely unknown man to him. The witnesses are trying to keep the other staff persons who pointed out the house of Mr.Mevada as not present and therefore, there is no evidence as to who led the raiding party to the residence of Mr.Mevada.

(vii) The seizure memo was prepared at Gandhinagar, however, the seizure memo which is at Exh.10, would show that the articles which were seized from the office of the Gujarat Housing Board, Estate Engineer No.2, and that too from the possession of the accused Dhanjibhai Swami, in that seizure memo, the Item No.1 is regarding the muddamal currency notes which were smeared with anthracene powder, therefore, that seizure memo falsifies the prosecution

case that the muddamal currency notes were seized from Mr.Mevada from Gandhinagar.

8. For short, according to Mr.Anandjiwala, the judgment and order of conviction and sentence recorded by the ld.trial Judge is erroneous and is based on one sided approach and therefore, the same is required to be quashed.

9. Mr.A.Y. Kogje, ld.APP, resisted all the submissions made by Mr.Anandjiwala and submitted that the case placed by the prosecution has been established and the witnesses have proved the case against the accused beyond reasonable doubt on four major points i.e. **(i)** initial demand, **(ii)** conversation that had taken place at pre-acceptance stage, **(iii)** passing of currency notes as illegal gratification to the accused by proving presence of anthracene powder marks on the hands of the accused and his pant pocket and **(iv)** recovery of the muddamal currency notes from another employee of Gujarat Housing Board

resident of Gandhinagar in couple of hours and leading evidence explaining the contingency and the reasons as to why the actual currency notes could not be recovered from the actual possession of the accused.

10. According to Mr.A.Y. Kogje, ld.APP, the evidence of the complainant at Exh.7 is sufficient to prove the initial demand and the ld.trial Judge has rightly appreciated the events that had taken place on 10th April, 1990 and 13th April, 1990, when the accused met the complainant for the first time. The initial demand was of Rs.1,000/-. However, on the date of offence an amount of Rs.500/- was given to the accused but how this situation has cropped up has been narrated by the witnesses examined by the prosecution. So the amount actually handed over to the accused was the settled amount. Mr.A.Y. Kogje, ld.APP, has fairly accepted that it is true that the fact of demand of Rs.1,000/- initial demand and thereafter, settled at Rs.500/- was not disclosed while filing the

complaint, but the fact remains that the accused accepted the illegal gratification. There is sufficient evidence as to the demand on the spot and this fact is established by the evidence of complainant at Exh.7 and decoy panch Mr.Vankar at Exh.8. The conduct of the accused of asking about the relationship between the complainant and the decoy panch Mr.Vankar shows his guilty mind. Thereafter, he had asked whether the complainant had brought money and on getting positive response, he directed both of them to go to the canteen and wait there till he would join them. Again in canteen, he asked for money which the complainant had brought. So there is no reason to disbelieve the say of decoy panch as to the demand made by the accused on the spot. Mr.A.Y. Kogje, ld.APP, has posed one question that when the complainant had paid the requisite transfer fees of Rs.1,000/- on 26th April, 1990 and when the documentary evidence to that effect was available, there was no need to demand any money for any purpose for the accused, even then when the accused asked a

question as to whether the complainant had brought money. The evidence of prosecution should be appreciated in the background of this conduct of the accused. On 26th April, 1990, the day on which the accused checked the file and put his initial on the forms creates a situation that there was no need to demand Rs.1,000/- or Rs.500/-. So this demand was nothing but demand of illegal gratification. The ld.trial Judge has rightly appreciated, according to Mr.A.Y.Kogje, the conduct of the accused in the background of the evidence led by the complainant as well as the panch. There was no need for the accused to tell either the complainant or the panch to wait there till he would join them. Why an employee should go in the canteen when practically no work for the complainant was left to complete the formality of submitting transfer form.

11. It is further argued by Mr.A.Y. Kogje, ld.APP, that the currency notes smeared with anthracene powder were recovered from Mr.B.K. Mevada who is examined as PW at Exh.12. This witness has

clearly stated as to what has exactly transpired. The currency notes were recovered from the house of this witness and the witness stated that the smeared currency notes were received by him from an unknown person who exchanged his currency notes for change. This witness identified this unknown person even in presence of the raiding party at Gandhinagar as well as before the trial Court during deposition. The nexus is clearly drawn betweent he handing over of the illegal gratification of Rs.500/- smeared currency notes to the accused and recovery of the same from Mr.Mevada. Over and above that, the amount of Rs.500/- consisting of currency notes of denomination of Rs.10/-, currency note of Rs.50/- each is also recovered.

12. There is no error, according to Mr.A.Y.Kogje, ld.APP, in drawing the panchnama, especially the last part of panchnama at Exh.9 and there was no need to draw the panchnama in three separate portions. Who accompanied the ACB personnel to

Gandhinagar, and in whose presence the notes were recovered, whether the ACB officer Mr.Vyas had gone to Gandhinagar or not and why the panchnama was no completed at Gandhinagar itself, are the questions but not of importance. The case of the prosecution is required to be established as it is beyond doubt and in the present case, it is successfully established. The ld.trial Judge was not in a position to ignore the presence of anthracene powder on the pant pocket and the hands of the accused and this fact is proved by three witnesses namely complainant, decoy panch and Police Inspector Mr.Vyas. The police personnel who were allegedly in the canteen would not have added any strength in the case of the prosecution. No duplication was required as to the event occurred inside the canteen when decoy panch has been examined by the prosecution. There is evidence to show that anthracene powder was found on the body and clothes of the accused and the traces of such marks were also found on the hands, collar of the shirt and borders of

the pant pocket of the accused. The anthracene powder was also seen on fore finger tips and thumb tip of the left hand as well as palm of the accused. When the currency notes were not found from the pocket, then there was no need to ascertain whether the anthracene powder was there inside the pocket or not. It is clearly established that the currency notes were kept in the pant pocket. The traces of anthracene powder are also found on one currency note of denomination of Rs.10/-, recovered from the left side pant pocket of the accused. So it is inferable that the currency notes must have been kept inside the pocket. In the same way, the muddamal currency notes recovered from Mr.Mevada were also found smeared with anthracene powder. The conduct of the accused of leaving the place swiftly also speaks volumes about the same. Great efforts were made to recover currency notes from the accused and in that exercise it was found that the muddamal currency notes have been given to Mr.Mevada, one another employee of Gujarat Housing Board, who is resident of

Gandhinagar. Mr.A.Y. Kogje, ld.APP, has taken this Court through the deposition of Mr.Mevada. But according to Mr.A.Y.Kogje, the deposition of Mr.Mevada is not required to be scanned minutely. His deposition is relevant to prove that the muddamal currency notes were received by him in exchange and he in the presence of panch and ACB personnel had handed over the muddamal currency notes to the ACB persons and police officials who visited his house at Gandhinagar after his return from office and that also during night hours. The discrepancies introduced by the defence side or emerging from the evidence are not of grave nature or can be termed as material discrepancies.

13. According to Mr.Anandjiwala, the presence of anthracene powder at following important spots/places proves the actual transfer of muddamal currency notes smeared with anthracene powder referred to in the first part of panchnama; **(i)** The hand of the accused; **(ii)** On the border of the left side pant pocket; **(iii)**

one currency note of denomination of Rs.10/- found and taken out from the left side pant pocket of the accused and for recovery of muddamal currency notes from PW Mr.Mevada by the Investigating Officer in presence of panchas at Gandhinagar. According to Mr.A.Y. Kogje, ld.APP, this part of evidence should be read in the background of one fact that the presence of anthracene powder was also found on the hands of the complainant and decoy panch. Uopn receiving bribe money, the accused left the place/canteen swiftly and did not go to his work place/table straight while the complainant, panch and the members of the raiding party tried to trace and locate him at his work place. This conduct of the officers of the raiding party is natural and when the accused was not found, they made search of the accused in the other parts of the office as the office premises is a big complex, but ultimately the accused was found on his work place/table as he had returned to the table.

14. While replying the arguments advanced by

Mr.Anandjiwala on the genuineness of the second part of the panchnama and the conduct of the members of the raiding party including Investigating Officer and PW Mr.Mevada, Mr.A.Y. Kogje, ld.APP, submitted that Mr.Mevada in his deposition has stated that on that night, people including some from his office had come to his residence with the help of office staff of the Gujarat Housing Board and he had tendered currency notes received in the office against the change given by him and also mentioned the reason for which he exchanged the currency notes with the other person, but such facts are not of much relevance. The defence side has tried to introduce some discrepancies and Mr.Anandjiwala has attempted to magnify the minor discrepancies. The other evidence like panchnama, receipt issued by the Investigating Officer and the deposition of the Investigating Officer and the complainant are sufficient to establish the case of the prosecution beyond reasonable doubt. Minor alleged infirmities should be ignored and the ld.trial Judge has

rightly not focused on these aspects.

15. According to Mr.A.Y. Kogje, ld.APP, the accused has failed in explaining the presence of anthracene powder on his hand, shirt and pant put on by him, and he has also failed to explain as to why the currency notes reached to Mr.Mevada. The judgment of this Court delivered in Criminal Appeal No.819 of 1985 relied on by the defence would not help the accused because the facts are materially different in the cited decision and, therefore, the ratio of the said decision is distinguishable. The acquittal in the cited case is based on the fact that the handkerchief of the accused did not smear with anthracene powder though the smeared currency notes were put in the same pocket. In the present case, one currency note of denomination of Rs.10/- recovered from the pocket of the accused shows traces of anthracene powder. According to Mr.Kogje, on the contrary, the ratio of the decision of the Apex Court in the case of ***State of Maharashtra vs. Narsingrao***

Gangaram Pimple, reported in AIR 1984 SC 63, supports the say of the prosecution. By referring to paragraph nos.35 to 38, he has focused on the observation in paragraph no.36, wherein it is held that where in a trap case, the Judge magnified every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence then, it would be the very antithesis of a correct judicial approach to the evidence of witness in a trap case. Indeed, if such a harsh touchstone is prescribed to prove such a case, it will be difficult for the prosecution to establish any case at all.

16. Mr.A.Y. Kogje, ld.APP, has placed reliance on one more decision in the case of ***State of Andra Pradesh v. K. Punardana Rao, reported in AIR 2004 SC 4194***, whereby the Apex Court has observed that :

> *"6. The High Court committed a serious error by rejecting the evidence*

of P.W. 1 and the evidence of accompanying witnesses of the trap party. The recovery of the tainted money from the respondent coupled with the evidence of P.W.1 clearly establishes that the respondent did receive a bribe and thus committed the offence under S.13(1)(d) read with S.13(2) of the Prevention of Corruption Act, 1988. The defence evidence adduced by the respondent was not able to cast any suspicion on the prosecution case.

7. We are quite aware that this being an appeal against acquittal, this Court would be slow in reversing the acquittal, when the High Court has taken a reasonable view of the evidence adduced by the prosecution; but if there is perverse appreciation of evidence and serious miscarriage of justice, the acquittal of the accused is to be reversed. This is one such

case where the High Court failed to appreciate the evidence in the correct perspective. Minor flaws in the prosecution evidence were given undue importance and the impeccable evidence which unmistakably proved the guilt of the respondent was ignored. Therefore, we are of the view that the acquittal of the accused was clearly erroneous and the same is reversed. We find the respondent guilty of the offence punishable under S. 13(1)(d) read with S.13(2) of the Prevention of Corruption Act, 1988. On each count, the appellant is sentenced to undergo imprisonment for a period of one year. The sentence on both counts shall run concurrently. The cash amount of Rs.20,000/- recovered during the course of investigation shall be returned to P.W.1."

17. In the cited case, the Apex Court allowed the appeal filed by the State and reversed the

judgment and order of acquittal.

18. Mr.A.Y. Kogje has also relied upon the third decision in the case of ***T.Shankar Prasad vs. State of Andhra Pradesh, reported in AIR 2004 SC 1242,*** whereby he has argued that the ld.trial Judge has drawn inferences on facts proved by the prosecution and presumption is an inference of certain facts drawn from proved facts. When the prosecution has established satisfactorily the acceptance of the bribe money by the accused, the accused was under obligation to rebut that presumption and by pointing out minor infirmities from the evidence led by the prosecution, he cannot say that he has satisfactorily rebutted the presumption. The Court can on factual presumptions really draw certain inferences when it is able to draw the same. When in the present case, presence of anthracene powder marks at six important spots/places is proved by prosecution beyond reasonable doubt, the ld.trial Judge was competent to draw presumption against the

accused. In support of this submission, he has taken this Court through relevant paragraph nos.13 and 14 of the judgment in the case of T.Shankarprasad (supra), whereby he has relied upon the case of ***Suresh Budharmal Kalani vs. State of Maharashtra, reported in 1998 (7) SCC 337*** and submitted that the appeal of the accused should be dismissed.

19. Mr.Anandjiwala, learned counsel appearing for the appellant-orig.accused and Mr.A.Y. Kogje, ld.APP, have taken me through the basic features of the case placed by the prosecution and the nature of evidence led in support thereof. All the material relevant parts of the deposition of the witnesses have been read over to the Court and I have also gone through the same. In the background of the discrepancies and contradictions pointed out by Mr.Anandjiwala and certain basic infirmities emerging from record including the method of drawing panchnama, especially the second part of panchnama allegedly drawn by the Investigating Officer,

certain following aspects emerging from the evidence available on record need to be considered so as to appreciate the arguments advanced by Mr.Anandjiwala for the accused :

(i) The muddamal currency notes have not been recovered from the possession of the accused or at the instance of the accused.

(ii) The evidence as to the presence of accused at the residence of Mr.Mevada when muddamal currency notes were taken and recovered from him, was there or not, is doubtful.

(iii) The receipt of recovery of muddamal currency notes ought to have given to Mr.Mevada and prosecution was under obligation to prove as to who paid the amount equal to Rs.500/- to Mr.Mevada and why, when muddamal currency notes were taken from him. The presence of

Investigating Officer at Gandhinagar is doubtful and, therefore, probably no panchnama was drawn there. When the exercise to trace the anthracene powder on the hands and clothes of the accused or the complainant or the decoy panch, was undertaken at the office of the Gujarat Housing Board, why formal panchnama was not drawn, is the question which was required to be answered satisfactorily by the prosecution. When the submission made by Mr.Anandjiwala that this is a case where panchnama ought to have been drawn in three different parts. The facts indirectly placed by prosecution that Mr.Mevada and the accused might be unknown to each other though serving with Gujarat Housing Board since years, is also doubtful.

(iv) The evidence of Mr.Mevada does not carry the case of prosecution any

further; on the contrary, it exposes the infirmities of the case of the prosecution and the conduct of the complainant, decoy panch no.1 and the officers of the raiding party, who were present there in the canteen where the alleged “give and take” of muddamal currency notes took place. There is no evidence of demand of illegal gratification by the accused on the table of the canteen of the Gujarat Housing Board.

(v) When the accused left the canteen of the Gujarat Housing Board, it was possible to intercept the accused immediately or he could have been followed swiftly by the police personnel, who were present in the canteen and could have been intercepted in between with muddamal currency notes in his pocket. It is always difficult to put paper currency

notes in a pant pocket in a perfect sitting posture unless some bodily adjustment is made. So a person sitting on a chair near the table tries or make attempt to put the paper currency notes fully inside the pant pocket, normally one will have to make some change in his position/ posture or he shall have to get up at least for a while. So this conduct of the accused could have been visualised by the raiding party personnel already present in the canteen but the prosecution has not led any evidence of this nature. It is not the case of the prosecution that the accused had started running and the raiding party or the complainant were not aware about the various ways or staircases of the office complex of the Gujarat Housing Board and, therefore, the accused was able to leave the canteen swiftly. The conduct of the accused of

returning to his table, whether he is inconsistent to his guilt, is again a question which ought to have been answered by the prosecution; otherwise like Mr.Mevada, he also could have left the office.

(vi) The important individual witnesses like peon, who took the raiding party to the residence of Mr.Mevada or the evidence of the person who gave information to the Investigating Officer that the accused had exchanged the muddamal currency notes with Mr.Mevada and Mr.Mevada is a resident of Gandhinagar, could have helped the prosecution in proving the transit of muddamal currency notes from the hands of the complainant to the possession of Mr.Mevada. How many persons touched the muddamal currency notes when they were taken from the residence of Mr.Mevada, is also the question and

there is ample scope for the decoy panch no.1 to have either touched the muddamal currency notes when they were taken from Mr.Mevada and brought to the spot when second part of panchnama came to be drawn. The second part of panchnama has not been proved in the manner in which it is required to be proved.

20.1 The prosecution is supposed to prove the case substantially as placed beyond reasonable doubt and infirmities found in the case placed and the evidence led by the prosecution should be held to be insufficient to raise any doubt and the Criminal Court is supposed to record a finding that the alleged infirmities emerging from record are not sufficient to uproot either the case of the prosecution or its strength. It is true that the theory placed by the defence by way of suggestion through one or two witnesses cannot be equated with evidence in favour of the accused. While appreciating the

evidence, the probability suggested or possibilities inferable from the record itself obviously shall have to be considered by the ld.trial Judge. While reading the finding recorded by the ld.trial Judge, any person capable of common understanding having sound logic should get convinced that the case has been established satisfactorily and there is no shadow of doubt. It is true that the legal defence or technical pleas are not capable of appreciation by a common man. So the judgment at the anvil before the Appellate Court needs to be appreciated from all probable different angles; especially when the prosecution is entitled to say that certain presumptions against the accused be drawn in view of the scheme of a particular statute like the Prevention of Corruption Act. In the present case, one argument placed by Mr.Anandjiwala during his oral submissions that when the muddamal currency notes have not been found from the physical custody i.e. from his pant pocket then before raising presumption against

the accused, the ld.trial Judge was supposed to scan the evidence closely as to the acceptance of amount by the accused in the Gujarat Housing Board canteen in presence of decoy panch no.1.

20.2 The evidence as to the demand of bribe amount in the canteen has not been satisfactorily proved as there is no consistency in the evidence led by the prosecution, if the evidence of complainant as well as decoy panch no.1 is read. This was the crucial period when something must have occurred, it may be in words or by signs. But the evidence has not ever given clear picture. It is rightly argued that what prevented the prosecution in examining the three police personnel, who were present in the canteen itself when the alleged, 'give and take' took place and why the agreed signal was not given immediately before the accused left the canteen. Even without signal the police personnel could have intercepted the accused by assessing even the body language of three witnesses namely the complainant and the

decoy panch. So it is reasonably inferable that these three police personnel were not sure whether the actual transaction of the bribe amount has taken place or not. The seat of these three police personnel whether was in the area from where the table and the chairs where the complainant, accused and the decoy panch were sitting, was visible or not; could have been brought before the Court by examining only one of these three police personnel. But it appears that to screen this infirmity as to the conduct, especially of the complainant and the three police personnel, who were present in the canteen and to avoid explanation that the prosecution ought to have given as to how the accused was able to leave the canteen and they were not even able to chase the accused till he returned to his table on his own from the very complex itself. Certain facts are not stated either by complainant or Panch No.1 and none of the two members has been examined.

20.3 It is in evidence that the Gujarat Housing

Board office building complex is a big complex but bare words “huge complex” by itself would not make the complex so big that one cannot trace a person from the very premises. So the complexity of the complex was required to be established and it is possible from mere inquiry about the probable places from where the accused can be traced out. If the intention of the accused was to get rid of the custody of the muddamal currency notes then he ought not have selected his own colleague working with the Gujarat Housing Board. When he was able to escape from the spot, he could have left the office and could have exchanged the said currency notes with any outsider. It is possible that the accused may not be knowing that he has been trapped and the raiding party personnel are chasing him and he had exchanged the currency notes innocently, which were smeared with anthracene powder. In this fact situation, he would select a known person who would readily accept the amount from him and give change for all these currency notes. The

attempt by prosecution to place a case that Mr.Mevada and the accused were not knowing each other at all, their serving with the Gujarat Housing Board and having their office premises in the same complex is also not a convincing theory. The deposition of Mr.Mevada and his conduct is also not found transparent. It appears that he has helped the case of the prosecution to some extent to get rid of the complexions in which he himself might have been put. I am not in agreement that this is a case where a test identification was required to be carried out before the Executive Magistrate and the prosecution ought to have led such evidence to link the accused and Mr.Mevada with the actual transaction of currency notes that had taken place between them. When it is a clear case of the prosecution that muddamal currency notes were found from Mr.Mevada and those currency notes were given to the complainant as per the first part of panchnama in presence of panchas and the officers of the raiding party, then it is inferable that in any manner

currency notes reached to Mr.Mevada or can be given to a preson who may get the currency notes exchanged with Mr.Mevada and raiding party can claim that the trap has remained successful. Even the evidence of T.I. Parade probably would not have created any confidence in the mind of the Court and the same could have been assailed by saying that the T.I. Parade panchnama is a drama and it is not possible to accept that two persons serving with the Gujarat Housing Board were not knowing each other prior to the alleged transaction and the T.I. Parade panchnama is a creation to add the strength in the say of prosecution. But there is enough strength in the say of Mr.Anandjiwala that the recovery of muddamal currency notes from Mr.Mevada from Gandhinagar, in any manner in which it is placed by prosecution, is doubtful. There are many important infirmities and contradictions. It is doubtful that the Investigating Officer and the head of the raiding party Police Inspector Mr.Vyas was present at Gandhinagar, otherwise a

detailed panchnama could have been drawn there at Gandhinagar only. There is no convincing explanation by any of the witnesses examined by the prosecution as to why the second part of panchnama was not drawn and completed where the test of ultraviolet lamp on the hands of the accused, complainant, etc. was carried out in the office of the Gujarat Housing Board at about 19-30 hours. It is in panchnama that the panchas as well as the raiding party left Ahmedabad for Gandhinagar at about 19-45 hours and had reached Sector-24 at Gandhinagar at 20-40 hours. The submission made by the accused when the test by ultraviolet lamp was being carried out is inadmissible in evidence. So the reference as to the words uttered by the accused made in the panchnama cannot be read or considered for any purpose. One question was required to be answered by the prosecution is what is the evidence as to the disclosure of name of Mr.Mevada and how the police was able to reach at the residence of Mr.Mevada. It is true that the Investigating Officer was acting

upon the clues given by the accused but the method of leading such evidence so collected on the clues given by the accused should be legal. As per the Rule of Best Evidence, the prosecution was supposed to establish that the second part of panchnama was drawn and completed at Gandhinagar. It is true that as per the panchnama, the panchas have signed the second part of panchnama in the Government vehicle at Sector-24, Gandhinagar and the time mentioned in the panchnama is 22-25 hours on 30th April, 1990. So the act of keeping the second part of panchnama open before proceeding to Gandhinagar makes the entire second part of panchnama doubtful; otherwise the prosecution could have led satisfactory evidence as to why one currency note allegedly found from the pocket of the accused was seen with some marks of anthracene powder and not other currency notes, including the notes which were accepted by the accused in the alleged exchange against the bribe amount. Without touching those currency notes, the accused could not have put

them in his pocket and prior to that exchange transaction as per the say of the prosecution, the accused had come in contact of muddamal currency notes in the canteen itself and thereafter, he had moved to more than one place. The other currency notes of the amount of salary received by Mr.Mevada also could have been brought under the ultraviolet lamp test because it is not the say of Mr.Mevada that these notes were kept separately and in a different pocket than of the remaining amount of salary. On the contrary, the say of the prosecution is that for his convenience Mr.Mevada had accepted the currency notes of higher denomination. He would keep the amount of salary at one or two places for safety purpose. The picture is very hazy as to who went inside the house of Mr.Mevada; why Mr.Mevada was not requested to co-operate with drawing of panchnama; why the receipt of recovery of currency notes was not given to Mr.Mevada; how Mr.Mevada was compensated or till date he has remained uncompensated; are

the questions which do not get satisfactory answer from the evidence led by the prosecution. It is accepted proposition of law that if the first part of panchnama drawn by the panchas is found doubtful, then the Court should not place reliance to link the accused with the crime on the second part of panchnama and basic infirmity is found in drawing the second part of panchnama adversely affects to the entire case of prosecution because it is the crucial part of evidence in ACB trap cases. It appears that as the head of raiding party was not there at Gandhinagar, the second part of panchnama was kept open and hurriedly after recovery of currency notes from Mr.Mevada, the panchnama has been completed. So the evidence of panch that he has signed the panchnama at Gandhinagar by itself would not be sufficient to prove the genuineness of the procedure followed by the members of the raiding party while drawing the second part of panchnama. How many persons were able to travel in a Government vehicle like the jeep, is also a

question but it is not necessary to discuss because in our country, the people are used to travel with overloading capacity even in a passenger vehicle. The statement of Mr.Mevada could have been recorded by prosecution confronting Mr.Mevada by placing the accused before him. Even before the Court, Mr.Mevada has not stated that the accused is the person from whom he had accepted the muddamal currency notes. The close reading of evidence of Mr.Mevada does not carry the prosecution case any further; on the contrary, it adds certain infirmities. The version of Mr.Mevada appears to be of a person who is deposing before the Court to save his skin in the Court room. How the evidence of such a witness could have been used by the ld.trial Judge for recording a finding to the effect that evidence led by the prosecution to prove the second part of panchnama is convincing.

21. There is also force in the argument of Mr.Anandjiwala that to prove the initial demand,

the prosecution could have examined the owner of the house Vasantben. In the same way, if the accused had really intimated the complainant and the decoy panch to go to the canteen and intention of the accused was to accept the amount of bribe in the canteen, then there was no need to enter into detailed conversation as placed by the prosecution before the Court. This is the reason as to why there is lack of consistency in evidence led by the prosecution and the conduct of the complainant as well as the decoy panch in the canteen till the accused left the actual area where he had accepted the bribe amount. It is not necessary to re-narrate the points placed by Mr.Anandjiwala before the Court during his submissions and it can be said by the Court that the points raised by Mr.Anandjiwala referred to in the foregoing paragraphs have some force and all these points have not been satisfactorily answered by the learned Special Judge. When it is specifically referred to in the panchnama that at about 16-50 hours, the accused had started moving outside

the canteen room after accepting the bribe amount, then after how many hours or minutes the police was able to locate and intercept him, ought to have been brought on record. When it is mentioned that the second part of panchnama is completed at 22-15 hours, then at what point of time, the exercise of drawing panchnama actually commenced, is not satisfactorily established beyond doubt.

22. As per the settled legal position, if the prosecution is able to lead the cogent and convincing evidence as to the acceptance and recovery of the amount of bribe money, then some minor infirmities of conversation as to the demand may not be considered such important and the Court legitimately inferred on the strength of other evidence that the acceptance and recovery of amount impliedly corroborates the evidence as to the demand of the bribe amount. But in the present case, when the acceptance and recovery of the amount is under clear shadow of doubt, it would not be proper or otherwise legal

to say that the prosecution has proved the demand of the bribe amount beyond doubt; otherwise the owner of the property sold i.e. Vasantben, could have corroborated the theory of demand placed by Vasantben or three police personnel who were there in the canteen. As discussed earlier, certain conflicts in the evidence of decoy panch no.1 and complainant in such a fact situation automatically becomes relevant.

23. The conduct of the three police personnel present in the canteen, though they were members of the raiding party is also found doubtful, otherwise they could have rushed and intercepted the accused. The presence of anthracene powder on the hands and clothes of accused, ofcourse, is an important piece of evidence and this would raise a serious doubt as to the conduct of the accused but when it is doubtful that at what place and time, the second part of panchnama has been drawn as discussed in foregoing paragraphs, the Court cannot ignore one fact that the

accused has travelled with the complainant and the other members of the raiding party including the decoy panch nos.1 and 2 who were probably party to search the pant pocket and clothes of the accused, when he entered his office.

24. In more than one judgment, it is observed by the Courts that the panchas being Government servants, in ACB trap cases, they have tendency to support the case of the prosecution in the best possible manner and, therefore, while evaluating the evidence of such decoy panchas, the Court should be doubly conscious and, therefore, the evidence of such witness should be appreciated in the background of the totality emerging from record. Here it appears that the prosecution has tried to prove that the raid has remained totally successful.

25. When the prosecution has not led any legal and admissible evidence as to who informed the Investigating Officer, about the fact that the muddamal currency notes are with one Mr.Mevada

and he is resident of Gandhinagar and when a pointed explanatory question at the time of recording statement under Section 313 of the Code of Criminal Procedure, 1973 was not possible to be asked to the accused, pointing out this type of allegedly incriminating evidence, it would not be possible for this Court to say that the accused has not explained as to how the currency notes reached to Mr.Mevada. On the contrary, the convincing legal evidence on this aspect was required to be led by the prosecution. Merely because the prosecution says that the accused swiftly left the place by itself, would not be considered as an incriminating circumstance against the accused. It appears that he had left the table of the canteen as per his convenience and was able to loiter in the office premises and, therefore only, as said by the prosecution, he was able to exchange the muddamal currency notes with Mr.Mevada.

26. The ratio of the decision in the case of

Narsingrao Pimple (supra) would not help the prosecution because in the present case, the defence is not mere suggestion which can be said to have been categorically denied by the prosecution. The Apex Court in the cited decision was able to observe that the approach made by the learned Judge towards prosecution has not been independent but one with a tainted eye and innate prejudice. Here in the present case, such facts and circumstances are available on record. In the case of ***K. Punardana Rao (supra)***, the Apex Court has held that the case of the prosecution is with minor flaws and the defence was not able to cast any suspicion on the prosecution case. The present case is contrary as discussed above. In the same way, in the case of ***T.Shankar Prasad (supra)***, the Apex Court has observed that for the purpose of reaching one conclusion, the Court on a factual presumption and unless the presumption is disproved or dispelled or rebutted, really can treat the presumption as tantamount proof. But when this Court is not able to accept the

genuineness of the second part of panchnama and oral evidence to prove this part of panchnama, it is legally possible to raise any presumption. Adequate evidence to raise presumptions shall have to be led by the prosecution first and, therefore, it is not possible for this Court to accept the arguments advanced by Mr.A.Y. Kogje. On the contrary, I would like to observe that the ratio of the decision of this Court ***(Coram :Akshay Mehta, J) in the case of Hanif Mohmad Gafubhai Mir vs. State of Gujarat, (Criminal Appeal No.282 of 1993, decided on 21st-22nd December, 2004)*** cited by Mr.Anandjiwala, would squarely help the present accused. The learned Single Judge by discussing the facts of the cited case has observed that :

> *"4.4 It may also be noted here that right from the beginning , the case of the prosecution is that the appellant had instructed the complainant to place the notes in a paper packet since he never wanted to accept money hand to*

hand. This shows that the appellant was very much aware that he was under constant danger of being trapped. However, when the complainant visited him on 8th July, 1988 in the company of panch No.1, the appellant did not ask the complainant or the panch, who panch No.1 was. The natural conduct on his part would be to make immediate inquiry about the presence of the stranger when the demand and acceptance of the bribe was to take place. Considering the suspicious nature of the appellant and the precautions he was taking before accepting the bribe, it would have been very natural on his part to make the inquiry about panch No.1. But, he did not do so when he demanded the balance amount from the complainant, which is very unnatural. It is also in the evidence that the illegal gratification was accepted by the appellant while sitting in his office. It is also in evidence that there are other employees

of the office of the Mamlatdar sitting in the said office. According to the evidence of the complainant and panch, there were already about five to ten persons in the office. It that be so, it is doubtful whether the appellant would venture to demand bribe from the complainant. It is true that as per the previous instruction of the appellant, the currency notes were kept in a paper packet, but when the demand is made, it is likely to be heard by the persons sitting around the appellant. Rather, he would have tried to call the complainant at a secluded placed and accept it. But, according to the prosecution the demand had been made in the office itself. This also creates doubt in the mind of the Court whether the appellant in fact demanded the bribe on 8th July, 1998. Admittedly, the appellant had not accepted the amount and according to the prosecution, he had asked the complainant to place the

packet containing currency notes on the papers that were lying on the table. When the packet was placed, he opened his drawer of the table and drew the papers slowly towards the edge of the table just above the drawer so as to allow the packet to drop into it. It is also in the evidence that after the packet was dropped in the drawer, the appellant against put the papers on the table. In the meanwhile, the complainant and the raiding party rushed to the place. Thus, the hand-to-hand exchange of money is not there. Considering the aforesaid, it becomes doubtful whether the complainant placed the packet on the papers or placed it in the drawer.

4.5 The evidence of the complainant does not reveal that after the raiding party rushed to the place and recovered the currency notes from the drawer of the table of the

appellant; the hands of the appellant, the complainant and the members of the raiding party including the panchas were examined under the ultraviolet lamp. The evidence is completely silent on this aspect. This is a glaring defect in the case of the prosecution. The complainant being the eye witness, he ought to have stated about the experiment of Anthracene and ultra violet lamp after the recovery of the currency notes from the appellant. He is totally silent. The only sentence that has been said by him is that powdered notes were recovered. Strangely enough, the learned Public Prosecutor has also not got clarified this defect.

4.6 This leaves me with the evidence of panch No.1 and Inspector Desai with regard to the examination of currency notes under ultra violet lamp after the recovery of the notes from

the drawer of the appellant. It may be stated here that it was the Police Inspector who opened the drawer of the table of the appellant and brought out the packet containing powdered currency notes and it was he who opened the packet and brought out the currency notes from the packet. It is also to be noted here that according to the panch, the complainant, after placing the packet on the papers lying on the table, went out and immediately, the panch followed him. If that be so, it was not possible for them to know in what manner, the appellant had put the packet into the drawer. Not only that, but it is in the evidence that immediately after rushing to the appellant, the Police Inspector opened the drawer of the table of the appellant and brought out the packet. Though the P.I. has tried to explain that he already had talk with the panch and the complainant, the evidence of

the panch itself renders this version doubtful. If the complainant and the panch had immediately gone out, they would not have noted where the packet was kept by the appellant and if they were knowing, they could not have informed the Police Inspector that it was lying in the drawer. It is also strange that the Police Inspector, without asking any one, could bring out the packet containing the currency notes from the drawer o the table. This lends some support to the defence of the appellant that the packet was placed in the drawer by the complainant without his knowledge to cook up a false case against him. This shows that the complainant's placing the notes in the drawer of the table was known to the Police Inspector before-hand."

27. In this cited decision, the learned Single Judge after referring to the decision of the Apex Court in the case of ***Kanu Ambu Vish v. the State***

of Maharashtra, reported in 1971(1) SCC 503, has held that *"several doubts are raised in the mind of the Court with regard to veracity of evidence of the prosecution. May be that the prosecution has been able to prove the demand of bribe, but for remaining two aspects -viz. acceptance and recovery, the evidence is absolutely doubtful. I, therefore, hold that the conclusion drawn by the trial Court with regard to guilt of the appellant is erroneous. Considering the doubtful nature of evidence on the part of the prosecution, the trial Court ought to have given benefit of doubt to the appellant"*.

28. It is true that in the cited decision, it was not a matter of dispute that the accused had not accepted the bribe amount. In the present case, the evidence as to the acceptance is doubtful. This is a case of strong suspicion against the accused. It is relevant to note that the prosecution in some cases remains under obligation to explain contingency against it emerging from the evidence collected and failure to explain such contingency may go against the

prosecution or at least can affect adversely to the strength of the case of the prosecution. In the present case, no non-availability of evidence on the hands of Mr.Mevada and remaining currency notes of Mr.Mevada from the amount of his salary and absence of anthracene powder marks on the currency note of denomination of Rs.50/- recovered from the accused allegedly exchanged, are some of these incriminating circumstances against the prosecution, otherwise normally such marks could have been found and the prosecution could have led such evidence. In absence of such evidence, the strong contingency was required to be explained by the prosecution. This non-explanation would go against the prosecution. Therefore, it would be difficult for this Court to say that the prosecution has prove its case beyond reasonable doubt. Suspicion against the accused cannot take place on cogent and convincing evidence, which can be said to be proved within the meaning of Indian Evidence Act. So this is a case where the ld.trial Judge

ought to have acquitted the accused giving him benefit of doubt.

29. In view of above observations, the present appeal is hereby allowed. The appellant-accused is given benefit of doubt and, therefore, acquitted. The judgment and order of conviction and sentence under challenge dated 30th September, 1993, passed by the learned Special Judge (Court No.2) of City Ahmedabad, in Special Case No.4 of 1991, is hereby quashed and set aside. The fine, if any paid, be refunded to the appellant-orig.accused. The bail bond shall stand discharged.

(C.K. Buch, J)

Aakar